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STATE OF WASHINGTON
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State of Washington
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Case #: 1041110

SUPREME COURT NO. _____
NO. 85201-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAVELL LEWIS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Suzanne Parisien, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Lavell Lewis asks this Court to grant review of the court of appeals' unpublished decision in State v. Lewis, No. 85201-9-I, filed March 11, 2024 (Appendix A). The court of appeals denied Lewis's motion for reconsideration over a year later, on April 9, 2025 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted to determine whether the court of appeals' false procedural bar to reviewing Lewis's appeal on the merits violated his state constitutional right to appeal?

2. Is this Court's review warranted to resolve conflicting decisions among the court of appeals as to what constitutes "manifest" constitutional error?

3. Is this Court's review warranted to weigh in on whether remote proceedings may violate criminal defendants'

right to confer privately with their counsel at all critical stages of the litigation?

C. STATEMENT OF THE CASE

In February of 2016, Lewis was convicted among other things of promoting commercial sex abuse of a minor, his third most serious offense or "strike" offense. CP 21, 28. One of his prior strike offenses was second degree robbery. CP 28. Under Washington's "three strikes" law, the Persistent Offender Accountability Act, Lewis was sentenced to life in prison without the possibility of release. CP 25; RCW 9.94A.570. Lewis's convictions and sentence were affirmed on direct appeal, which mandated on July 27, 2018. CP 36-74.

In 2021, the legislature passed Engrossed Senate Bill 5164, 67th Leg., Reg. Sess. (Wash. 2021), which required resentencing for all persistent offenders with second degree robbery as one of their three strikes, regardless of the date of their offense. Laws of 2021, ch. 141, § 1. Lewis was entitled to resentencing under the

new law. The parties agreed the standard range for Lewis's promoting conviction was 240 to 318 months. CP 81, 161.

Lewis's resentencing hearing was held on March 10, 2023, before the same judge who presided over Lewis's trial and original sentencing. 3/10 RP 1, 28. Lewis appeared by Zoom from prison, while the prosecutor, defense counsel, and judge appeared in person in the courtroom. 3/10 RP 5-6; CP 234. The court noted, "I'm not used to having people here and on Zoom." 3/10 RP 6. The court later reiterated, "I'm not used to having sentencings when the affected party isn't here present[.]" 3/10 RP 18.

The defense requested an exceptional sentence downward of 96 months based on Lewis's mental health at the time of the offense and rehabilitation in prison since then. CP 81-86; 3/10 RP 18-22. The State opposed the defense's request for an exceptional down, instead arguing for the high end of the standard range—318 months. CP 161-62; 3/10 RP 7-17. Lewis allocuted at his resentencing, initially apologizing for the harm he had caused, but then stating he could not apologize to the complainant and her

family because "throughout that situation, I did nothing but try to help her, man." 3/10 RP 23-25.

The trial court rejected Lewis's request for an exceptional sentence below the standard range. 3/10 RP 27-28. The court found Lewis's conduct at the time of the offenses to be deliberate and strategic. 3/10 RP 28. The court instead imposed 300 months in prison on the promoting conviction. 3/10 RP 28; CP 114. Lewis appealed. CP 136.

On appeal, Lewis argued that his appearance at resentencing by video, in a different location than his attorney, violated his constitutional right to privately confer with counsel at all critical stages of the litigation. Br. of Appellant, 8-17. Lewis did not object in the trial court, so he emphasized on appeal, "Division Three recently held that denial of the right to confer is manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3)," with a pin citation to published decision in State v. Anderson, 19 Wn. App. 2d 556, 563, 497 P.3d 880 (2021). Br. of Appellant, 10. In Anderson, Lewis explained, the court of

appeals held the right to confer was violated, where the accused appeared for his resentencing by video, while his attorney appeared by telephone. Br. of Appellant, 10-11.

Lewis then provided several pages of argument as to why his case "involve[d] the very same procedure condemned in Anderson." Br. of Appellant, 10-14. For instance, Lewis emphasized, the record was silent on whether he consented to appear by video for his resentencing. Br. of Appellant, 13. Lewis also pointed out the trial court never specified any ground rules for how he might confidentially communicate with his attorney during resentencing, like requesting a breakout room. Br. of Appellant, 14. Lewis further emphasized nonverbal communication was impossible because he and his attorney were in different locations. Br. of Appellant, 14.

In response to Lewis's right to confer argument, the State agreed the constitutional right to counsel at all critical stages "encompasses an associated right to confer privately with

counsel." Br. of Resp't, 5. The State further agreed "Lewis has raised a constitutional claim." Br. of Resp't, 7.

The State nevertheless argued Lewis failed to demonstrate the claimed constitutional error was "manifest" under RAP 2.5(a)(3). Br. of Resp't, 7. The State acknowledged the holding of Anderson, but argued Anderson was wrongly decided. Br. of Resp't, 7-11. The State further acknowledged State v. Bragg, 28 Wn. App. 2d 497, 536 P.3d 1176 (2023), a published Division One opinion on the right to confer issue decided after Lewis filed his opening brief. Br. of Resp't, 13-14. The State attempted to distinguish Bragg, where the court found the right to confer error to be "identifiable on the record before the court" and therefore manifest. Br. of Resp't, 14; Bragg, 28 Wn. App. 2d at 504 n.5.

Lewis filed a reply brief, arguing the State's claim that the right to confer error was not manifest was based on a fundamental misconception of RAP 2.5(a)(3). Reply Br., 4. Lewis provided additional discussion of the gatekeeping function of RAP 2.5(a)(3)

and what "manifest" means in this context. Reply Br., 5-7. Lewis was also able to address Division One's intervening decision in Bragg for the first time. Reply Br., 1-2, 7, 10-11.

The court of appeals issued a decision on March 11, 2024. The court acknowledged Lewis cited published authority in his opening brief holding that denial of the right to confer at resentencing is manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3). Opinion, 4. The court nevertheless refused to reach the merits of Lewis's argument, reasoning "he does not provide argument as to why the alleged error is manifest in this case under the controlling legal framework until his reply brief." Opinion, 4. The court cited Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992), and State v. Orozco, 144 Wn. App. 17, 186 P.3d 1078 (2008), to conclude "[w]e decline to consider the merits of an argument raised for the first time in a reply brief." Opinion, 4.

Lewis filed a timely motion for reconsideration on April 1, 2024, arguing the court of appeals' procedural holding violated his

constitutional right to appeal, contravened the purpose of the RAPs, and conflicted with Division One's own decision in Bragg. Mot. for Reconsideration, 2-10. Lewis argued the right to confer issue was sufficiently briefed by reliance on published authority and, furthermore, he did not raise the issue for the first time in his reply brief. Mot. for Reconsideration, 2-8. Lewis therefore asked the court to reconsider its decision and reach the merits of his right to confer argument. Mot. for Reconsideration, 11.

The court of appeals called for an answer from the State. 5/9/24 Order Calling for Answer.

On May 14, 2024, the State filed an answer agreeing with Lewis that his "opening brief sufficiently argued that the error was 'manifest' and his appeal should not have been dismissed on purely procedural grounds." State's Reply to Mot. for Reconsideration, 3. The State maintained the right to confer error was not manifest, but agreed "Lewis did not, however, waive the ability to argue otherwise on appeal." State's Reply to Mot. for Reconsideration, 4. The State therefore urged the court of appeals

to "grant Lewis's motion for reconsideration, consider the merits of his argument, but find that waiver occurred." Opinion, 4.

The court of appeals did not rule on Lewis's motion for reconsideration for *more than a year* after it was filed. On April 9, 2025, the court of appeals summarily denied Lewis's motion, even though the State agreed it should be granted. 4/9/25 Order Denying Mot. for Reconsideration.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **This Court should decide whether the court of appeals' false procedural bar to reviewing Lewis's appeal on the merits violated his state constitutional right to appeal.**

The Washington Constitution guarantees criminal defendants like Lewis "the right to appeal in all cases." WASH. CONST. art. I, § 22. Included in this right to appeal is the right to have the appellate court consider the merits of all issues raised on appeal. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985). This Court's review is warranted under RAP 13.4(b)(3)

because of the court of appeals' false procedural bar to considering Lewis's claim violated his constitutional right to appeal.

In refusing to reach the merits of Lewis's right to confer argument, the court of appeals effectively held that criminal appellants cannot rely on published authority in their opening briefs. Instead, apparently, they must anticipate when the State will argue that a published case is wrongly decided and include discussion as to why it was correctly decided in their opening brief. If they do not do so, then the State can effectively nullify their appeal and make any reply brief pointless. This, of course, is not the law, nor should it be, given the constitutional right to appeal at stake.

The court of appeals' use of Cowiche Canyon and Orozco as a procedural bar was misplaced. Opinion, 4. Both of those cases recognized "[a]n *issue* raised and argued for the first time in a reply brief is too late to warrant consideration." Cowiche Canyon, 118 Wn.2d at 809 (emphasis added); Orozco, 144 Wn. App. at 21-22 (same). In Cowiche Canyon, for instance, the appellants raised a

claim of estoppel for the first time in their reply brief. 118 Wn.2d at 809.

Lewis did not raise a new issue in his reply brief. Instead, he responded to the State's argument that Anderson was wrongly decided. A new issue would be, for instance, if Lewis asserted a right to presence argument or an ineffective assistance of counsel claim for the first time in his reply. See, e.g., State v. Mitchell, noted at 30 Wn. App. 2d 1027, 2024 WL 1258229, at *5 n.7 (Mar. 25, 2024) (unpublished, GR 14.1) (refusing to consider ineffective assistance claim brought for the first time in the reply brief).

RAP 10.3(c) specifies a reply brief should "be limited to a response to the issues in the brief to which the reply brief is directed." The purpose behind this rule is that "[a] reply brief is generally not the proper forum to address new issues because the respondent does not get an opportunity to address the newly raised issues." City of Spokane v. White, 102 Wn. App. 955, 963, 10 P.3d 1095 (2000).

The State was not denied any opportunity to respond in Lewis's case. Lewis cited Anderson and discussed why his resentencing hearing was like the one in Anderson, where the defendant was physically separated from his attorney with no ground rules for how they could privately confer. Br. of Appellant, 10, 13-14. The State responded by acknowledging Anderson holds that such an error in manifest under RAP 2.5(a)(3), yet contending that Anderson was wrongly decided. Br. of Resp't, 7-8. Lewis replied that Anderson was correctly decided and, furthermore, the State's response was based on a misunderstanding of manifestness. Reply Br., 4-7. The right to confer issue was fully briefed.

Cowiche Canyon and Orozco do not stand for the proposition that a criminal appellant must anticipate every possible iteration of the State's response or else be procedurally barred from having their appeal considered on the merits. Contorting those cases in such a manner not only violates Lewis's constitutional right to appeal, but also the letter and spirit of the Rules of

Appellant Procedure. The Washington Supreme Court made this clear in State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995).

This Court in Olson court recognized "an appellate court generally will not consider an issue raised for the first time during oral argument where there is no argument presented on the issue and no citation to authority provided." 126 Wn.2d at 320. However, RAP 1.2(a) specifies "[t]hese rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." The Olsen court held RAP 1.2(a) compelled it to overlook a technical violation of the rules "where the violation is minor and results in no prejudice to the other party and no more than a minimal inconvenience to the appellate court." 126 Wn.2d at 319. The court reiterated:

> In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue.

Id. at 323; see, e.g., Conner v. Universal Utilities, 105 Wn.2d 168, 171, 712 P.2d 849 (1986) (reaching RAP 2.5(a)(3) claim raised for the first time in appellant's motion for reconsideration).

Lewis believes there was not even a technical violation of the RAPs here. But the point of Olsen still applies. That is, appeals should be considered on their merits where the court "is not greatly inconvenienced and the respondent is not prejudiced." Olson, 126 Wn.2d at 323. As established, there was no prejudice to the State here because Lewis did not raise a new issue for the first time in his reply brief. Indeed, the State agreed Lewis adequately briefed his right to confer claim, conclusively demonstrating no prejudice to the State. State's Reply to Mot. for Reconsideration, 3-4. The only inconvenience to the court of appeals was the usual one of having to decide an issue, which one would certainly hope does not constitute such great inconvenience that the court is justified in refusing to review it.

Furthermore, Division One decided Bragg months after Lewis filed his opening brief. Lewis therefore had no opportunity

to discuss Bragg in his opening brief and, consequently, did so at the earliest opportunity—his reply brief. Reply Br., 1, 10-11. Criminal appellants like Lewis are entitled to the benefit of case law decided while their direct appeal is still pending. In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 327, 823 P.2d 492 (1992).

In Bragg, Division One recognized a "manifest" error is one that "is identifiable on the record before the court." 28 Wn. App. 2d at 504 n.5. The Bragg court therefore held: "Here, the State conceded at oral argument and in its briefing that the record shows Bragg was separated from his counsel for every nontrial hearing and, particularly, in critical stage hearings, *making any error manifest*, and it conceded that such error was of a constitutional magnitude." Id. (emphasis added). In other words, the State in Bragg conceded the facts—physical separation at a critical stage—that made the error manifest. The State in Lewis's case acknowledged Bragg controlled on the initial RAP 2.5(a)(3) question, but again argued Bragg was wrongly decided. Br. of Resp't, 14-15.

Certainly, a reviewing court should not require a litigant to anticipate the holding of a case not yet decided. But that appears to be precisely what the court of appeals held by ignoring its own decision in Bragg and refusing to consider the merits of Lewis's claim. Moreover, as controlling precedent from Division One, the State bore the burden of demonstrating Bragg was both incorrect and harmful. In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Lewis did not bear the burden of demonstrating the opposite and most definitely could not be expected to do so in his opening brief before Bragg was even decided.

This Court should grant review to decide whether the court of appeals' refusal to decide a criminal appellant's fully briefed argument violates that individual's state constitutional right to appeal. RAP 13.4(b)(3). Alternatively, this Court should grant review and remand with instructions for the court of appeals to reach the merits of Lewis's right to confer claim, as the State agreed was appropriate. RAP 7.3 (authorizing appellate court "to

perform all acts necessary or appropriate to secure the fair and orderly review of a case").

2. **This Court's guidance is also needed because the court of appeals is clearly confused as to what constitutes "manifest" constitutional error.**

This Court has made clear there are three steps to manifest constitutional error analysis. First is the "gatekeeping function," which requires that the appellant demonstrate the asserted error is both manifest and of constitutional magnitude under RAP 2.5(a)(3). State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). Second is the determination whether an "actual violation" occurred, which "should not be confused" with the gatekeeping requirements of RAP 2.5(a)(3). Lamar, 180 Wn.2d at 583. Third, even constitutional violations are subject to harmless error analysis, for which the State bears the burden of demonstrating harmlessness beyond a reasonable doubt. Id. at 583, 588.

This Court has held "manifest" in RAP 2.5(a)(3) "requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The term "actual prejudice" suggests a

sort of harmless error analysis. But this Court has clarified "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009). The O'Hara court explained this means "the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error." Id. Thus, manifest just means obvious or readily apparent on the record. Id. at 108.

Despite this guidance, the three divisions of court of appeals have reached different conclusions as to whether right to confer errors are manifest. Division Three in Anderson found the right to confer error "obvious from the record," and therefore manifest, where it was apparent that the defendant "participated by video from the jail and his attorney was appearing by telephone from a separate location." 19 Wn. App. 2d at 563. Division One in Bragg likewise found the right to confer error "identifiable on the record before the court," i.e., manifest, where the record demonstrated

"Bragg was separated from his counsel for every nontrial hearing and, particularly, in critical stage hearings." 28 Wn. App. 2d at 504 n.5.

However, Division Two found no manifest error in State v. Dimas, 30 Wn. App. 2d 213, 544 P.3d 597, review denied, 3 Wn.3d 1026 (2024). Rather than looking to whether it was obvious from the record that client and counsel could not confer privately, the Dimas court concluded the error was not manifest "because Dimas cannot show that an ability to confer with defense counsel would have made any difference." Id. at 221; but see State v. Saunders, noted at 27 Wn. App. 2d 1023, 2023 WL 4348886, at *6 (July 5, 2023), review denied, 2 Wn.3d 1005 (Nov. 8, 2023) (unpublished, GR 14.1) (Division Two finding right to confer claim manifest "or obvious from the record").

Seemingly in conflict with its prior decision in Anderson, Division Three observed, based on Dimas, that "[t]he demands of manifest constitutional error shift the burden of showing prejudice to the accused." State v. Schlenker, 31 Wn. App. 2d 921, 945, 553

P.3d 712 (2024). The Schlenker court believed, "had Division One required Denver Bragg to show manifest constitutional error, as Division Two required of Jacob Dimas, Bragg likely would have lost his appeal." Id.

Again, this confusion appears to stem from the language "actual prejudice," which as this Court explained in Lamar is a different question than whether a constitutional violation was harmless beyond a reasonable doubt. Lewis believes the Anderson and Bragg courts correctly understood the test for manifest error, while the Dimas and Schlenker courts did not.

Here, it is obvious from the record that Lewis appeared by video from prison for his resentencing, while his attorney appeared in person in the courtroom. 3/10 RP 5-6; CP 234. Their physical separation made private communication—both verbal and nonverbal—during the hearing impossible. The trial court knew Lewis was not physically seated next to his attorney, commenting multiple times on his remote appearance. 3/10 RP 6, 18. Surely, had the court been alerted to the holding of Anderson, as well as

the requirements of CrR 3.4(e),[1] it would have corrected the error by informing Lewis of his constitutional right to confer and laying ground rules for how he could exercise that right. Rightly understood, then, the error asserted here is manifest.

The court of appeals' diverging interpretations of "manifest" in this context, some apparently in conflict with this Court's precedent, warrants this Court's definitive guidance under RAP 13.4(b)(1) and (3).

3. This Court has yet to weigh in on whether remote proceedings may violate a criminal defendant's right to confer with counsel.

As discussed, the court of appeals has grappled with several right to confer claims. But this Court has yet to weigh in on the issue. Lewis's case offers this Court a chance to do so, where it is undisputed the hearing at issue (resentencing) was a critical stage

[1] CrR 3.4(e)(2) allows for proceedings to be conducted by video conference, but "only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule." CrR 3.4(e)(3) further requires that "[r]emote technology must provide for confidential communications between attorney and client[.]"

of the proceedings. Br. of Resp't, 5; see State v. Brashear, 32 Wn. App. 2d 934, 941-43, 559 P.3d 121 (2024) (holding appellant failed to demonstrate any of the pretrial hearings at issue were critical stages), review denied, No. 103719-8 (2025).

"The constitutional right to counsel demands more than just access to a warm body with a bar card." Anderson, 19 Wn. App. at 562. Among other things, it requires the "opportunity for private and continual discussions between defendant and his attorney" at all critical stages. State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). "The ability for attorneys and clients to consult privately need not be seamless, but it must be meaningful." Anderson, 19 Wn. App. 2d at 562.

On direct appeal, Anderson won resentencing on three limited matters—a vague community custody condition, two clerical errors, and erroneous imposition of LFOs. Anderson, 19 Wn. App. at 559. Anderson attended his resentencing hearing by video, while his attorney appeared telephonically. Id. During the hearing, there was no discussion of whether Anderson consented

to appear by video. Id. Nor was there any clarification whether Anderson and his attorney were able to communicate throughout the hearing. Id.

The Anderson court distinguished these facts from State v. Gonzales-Morales, 138 Wn.2d 374, 979 P.2d 826 (1999). There, Gonzales-Morales required a Spanish interpreter to communicate with counsel and understand the proceedings. Id. at 376. During trial, the State called a Spanish-speaking witness, but was unable to secure its own interpreter. Id. at 376-77. The trial court allowed the State to borrow Gonzales-Morales's interpreter, subject to certain ground rules. Id. at 377. The court ordered the interpreter to remain at the defense table during the testimony. Id. at 387. The court also specified Gonzales-Morales could interrupt the testimony so he could communicate with his counsel, as needed, through the interpreter. Id. Additionally, the witness gave only brief testimony, in Spanish, which Gonzales-Morales could understand as a Spanish speaker. Id. This Court found no constitutional violation. Id. at 386.

By contrast, the Anderson court held the procedure used at Anderson's resentencing violated his constitutional right to confer privately with his attorney. 19 Wn. App. 2d at 563. Unlike Gonzales-Morales, the resentencing court "never set any ground rules for how Mr. Anderson and his attorney could confidentially communicate during the hearing." Anderson, 19 Wn. App. at 563. "Nor were Mr. Anderson and his attorney physically located in the same room," the court explained, "where they might have been able to at least engage in nonverbal communication." Id. Given that they appeared from different locations, it was "not apparent how private attorney-client communication could have taken place during the remote hearing." Id. The court of appeals found it "unrealistic to expect Mr. Anderson to assume he had permission to interrupt the judge and court proceedings if he wished to speak with his attorney." Id. The combination of these factors worked to deprive Anderson of his right to confer with counsel. Id.

The Bragg court also found a violation of the right to confer. There, Bragg appeared by Webex video from jail while his

attorney appeared in court for every nontrial hearing, including several critical stage hearings. Bragg, 28 Wn. App. 2d at 502-03. Like in Anderson, the Bragg court held it was error for the trial court not to set any ground rules for how Bragg could exercise his right to confer privately with counsel. Id. at 509. The court also found it unreasonable, or at least unrealistic, to place the burden on Bragg to assert his right to confer. Id. at 511.

Like in Bragg, Lewis appeared by video from prison, while his attorney appeared in person from the courtroom. 3/10 RP 5-6; CP 234. And, like in Anderson, there was no indication on the record whether Lewis consented to this arrangement. As in both Anderson and Bragg, the trial court never put on the record whether private communication between Lewis and his attorney was possible during resentencing. Nor did the court specify any ground rules for how Lewis might confidentially communicate with his attorney during resentencing, like requesting a breakout room. See 3/10 RP 5-6. Nonverbal communication was also impossible because Lewis and his attorney were in different

locations. Consistent with Anderson and Bragg, Lewis's appearance by video at a critical stage of the proceedings, without a specified means to privately consult with his attorney, violated his constitutional right to counsel.

In Anderson, the State met its high burden of proving harmlessness beyond a reasonable doubt. 19 Wn. App. 2d at 564. Anderson received all the forms of relief requested at his resentencing hearing. Id. There was no plausible basis for Anderson's attorney to ask to expand the scope of the hearing. Id. Attorney-client consultation therefore could not have made any difference. Id.

The record here is not as forgiving as in Anderson. Lewis certainly did not receive the relief he requested. The trial court rejected Lewis's request for an exceptional sentence below the standard range. 3/10 RP 27-28. The court further declined to sentence Lewis at the bottom of the standard range, instead imposing 300 months in prison, close to the high end of 318 months. 3/10 RP 28; CP 112-14.

It is impossible to guess how the opportunity for private consultation might have affected the outcome of Lewis's resentencing. See Bragg, 28 Wn. App. 2d at 514-16 (refusing to engage in speculation to the State's benefit on the question of harmlessness). For instance, Lewis started out his allocution well—apologizing for the harm he had caused—but then stated he could not apologize to the complainant because he was just trying to help her. 3/10 RP 23-25. This undoubtedly did not curry any favor with the judge.

Real-time conference with counsel, or perhaps just a nudge or a glance (the kind of nonverbal communication that was impossible) might have influenced what Lewis decided to say and, in turn, the court's sympathy for his situation. This is particularly true given the evidence of Lewis's engagement and improvement in prison, as well as the court's rejection of the State's request for 318 months. CP 110. Under the circumstances, the State cannot carry its weighty burden of demonstrating harmlessness beyond a reasonable doubt.

Review of this significant constitutional question is warranted under RAP 13.4(b)(3). Additionally, given the increased use of remote proceedings, the right to confer with counsel at such hearings is an issue of substantial public interest, further warranting review under RAP 13.4(b)(4).

E. CONCLUSION

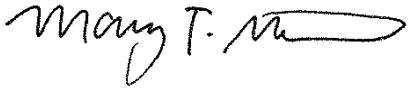
For the reasons discussed, this Court should grant review and reverse the court of appeals. Alternatively, this Court should grant review and remand for the court of appeals to decide Lewis's appeal on the merits.

DATED this 29th day of April, 2025.

I certify this document contains 4,818 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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Appendix A

FILED
3/11/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LAVELL DEMEATREOUS LEWIS, Appellant.	No. 85201-9-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — For the first time on appeal, Lavell Lewis argues that his virtual appearance at his resentencing from a different location than his attorney violated his constitutional right to privately confer with counsel. We decline to consider the claim as Lewis does not establish manifest constitutional error under RAP 2.5(a)(3). We therefore affirm the judgment and sentence. However, we remand to the sentencing court to strike the victim penalty assessment and the imposed term of community custody on the count of rape of a child in the third degree, because with it, the sentence exceeds the statutory maximum.

FACTS

In 2016, Lavell Lewis was found guilty by a jury of promoting commercial sexual abuse of a minor (count I), rape of a child in the third degree (count 2), and tampering with a witness (count 3). Promoting commercial sexual abuse of a minor is a "most serious offense" or "strike" offense. RCW 9.94A.030(32), (37); RCW 9.68A.101(2). At the time of sentencing for the 2016 convictions, Lewis already had prior convictions for two most serious offenses—a 2002 conviction

for robbery in the first degree and a 2011 conviction for robbery in the second degree. Pursuant to the Persistent Offender Accountability Act (POAA), Lewis's conviction for commercial sexual abuse of a minor was a third strike and mandated a sentence of life in prison. RCW 9.94A.570.

In 2019, the state legislature removed robbery in the second degree from the POAA's list of strike offenses. ENGROSSED SUBSTITUTE S.B. 5288, 66th Leg., Reg. Sess. (Wash. 2019). Thus, all persistent offenders whose current or past convictions for that crime "was used as a basis for the finding that the offender was a persistent offender" became entitled to resentencing, RCW 9.94A.647(1), including Lewis.

Lewis's resentencing hearing took place on March 10, 2023. The judge, prosecutor, and Lewis's defense counsel appeared in open court. Lewis, who was in the custody of the Department of Corrections, appeared via the Zoom videoconferencing platform. A mitigation specialist who prepared a report on behalf of Lewis also appeared virtually.

The parties agreed that the standard sentencing range for promoting commercial sexual abuse of a minor based on Lewis's offender score was 240 to 318 months.[1] The State sought a sentence within the standard range. Lewis argued that his circumstances warranted an exceptional sentence downward because of violence and trauma Lewis experienced in his youth, mental health

[1] The parties also agreed that Lewis's offender score resulted in a maximum sentence of 60 months for rape of a child in the third degree and a range of 33 to 43 months for tampering with a witness.

challenges, and "unusually long pretrial lockdown incarceration 'in the hole' prior to trial when the defendant proceeded pro se."

The court considered the mitigation information provided by the defense and ultimately declined to impose an exceptional sentence. The trial judge acknowledged Lewis most likely suffers from mental disorders and impacts of traumatic experiences, but that she was unable to find the requisite nexus between the mental health condition and the conduct of the defendant sufficient to support an exceptional downward deviation. Lewis was resentenced to 300 months in prison for promoting commercial sexual abuse of a child, and 60 months' and 43 months' incarceration for rape of a child in the third degree and tampering with a witness, respectively. The sentences were ordered to run concurrently. Lewis timely filed this appeal.

DISCUSSION

I. Right to Counsel

Lewis appeals his new sentence, arguing for the first time on appeal that his virtual appearance from a different location than his attorney violated his constitutional right to privately confer with counsel.

RAP 2.5(a) generally precludes review of claims of errors that the appellant did not raise at the trial level. Errors of manifest constitutional dimension may be considered for the first time on review, but the appellant has the burden of "identify[ing] a constitutional error and show[ing] how the alleged error actually affected the [appellant]'s rights at trial." State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

Lewis concedes he did not object below to appearing remotely at resentencing. Reply Br. of Appellant at 4. The only reference in his opening brief to RAP 2.5(a)(3) is in a description of State v. Anderson, 19 Wn. App. 2d 556, 497 P.3d 880 (2021). Br. of Appellant at 10 ("Division Three recently held that denial of the right to confer is manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3)."). But he does not provide argument as to why the alleged error is manifest in this case under the controlling legal framework until his reply brief. We decline to consider the merits of an argument raised for the first time in a reply brief. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); State v. Orozco, 144 Wn. App. 17, 21-22, 186 P.3d 1078 (2008).

Because Lewis did not object in the trial court to appearing remotely for his resentencing hearing and fails to provide the necessary argument in his opening brief to demonstrate that the alleged error is of a constitutional magnitude and manifest, we do not consider this challenge. See State v. Holzknecht, 157 Wn. App. 754, 759-60, 238 P.3d 1233 (2010); see also RAP 2.5(a)(3).

II. Community Custody and Sentence Exceeding Maximum Term

The trial court imposed 36 months of community custody for both the convictions for promoting commercial sexual abuse of a minor (count 1) and rape of a child in the third degree (count 2). The statutory maximum sentence on the charge of rape of a child in the third degree is 60 months. RCW 9A.44.079(2). Both incarceration and community custody count toward the statutory minimum

sentence. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). Thus, 36 months of community custody in addition to the 60 months of incarceration imposed on count 2 exceeds the statutory maximum of 60 months. The State concedes that the community custody term of 36 months as to count 2 should be stricken. We accept the State's concession and remand for correction of the judgment and sentence.

III. Victim Penalty Assessment

Lewis was also ordered to pay the Victim Penalty Assessment (VPA) pursuant to RCW 7.68.035 at the time of his resentencing. The legislature has since amended the imposition of the VPA "if the court finds that the defendant, at the time of sentencing, is indigent as defined in RCW 10.01.160(3)." Despite the lack of an express finding of indigency by the trial court, the State acknowledged Lewis's indigency at the time of resentencing and, on appeal, does not dispute that Lewis is indigent. We therefore accept the State's concession that the court should strike the VPA.

We affirm the judgment and sentence but remand to strike the community custody term on count 2 and the VPA.

Chung, J.

WE CONCUR:

Hazelrigg, ACJ

Smith, C.J.

Appendix B

FILED
4/9/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LAVELL DEMEATREOUS LEWIS, Appellant.	No. 85201-9-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Lavell Lewis filed a motion for reconsideration of the opinion filed on March 11, 2024 in the above case. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chung, J.

Judge

NIELSEN KOCH & GRANNIS P.L.L.C.

April 29, 2025 - 9:37 AM

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